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IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

October Term 1995

Doyle C. Alley,

Petitioner

vs.

General Electric Capital Corp.,
a wholly-owned subsidiary of
General Electric Company,

Respondent

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

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Question Presented

Does the Celotex burden on nonmovant responding to a summary judgment motion empower the court to itself weigh competing inferences from the evidence and to itself resolve disputed facts, when nonmovant has offered sufficient indirect evidence to allow the trier of fact to make a finding of pretext?

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, No.

Opinions Below. 2

Jurisdiction. 3

Constitutional and statutory provisions involved. 3

Statement of the case. 3

Reasons for granting the writ. 11

Conclusion. 27

APPENDICES

Opinion of the Court of Appeals for the Seventh Circuit 2a

Opinion of the District Court for the Northern District of Illinois, Eastern Division 26b

Court of Appeals Denial of the Petition for Rehearing (issued November 10, 1994) 67c

TABLE OF AUTHORITIES CITED

Cases Page

Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994). 2, 14, 16, 22, 25

Anderson v. Liberty Lobby, 4 77 U.S. 242, 106 S.Ct. 2505 (1986). . . 6, 14,

Billups v. Methodist Hospital of Chicago, 922 F.2d 1300 (7th Cir. 1991) . 19

Caldwell v. Miller, 790 F.2d 589 (7th Cir. 1986). 19

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986). .1, 2, 6, 7, 14, 18, 24, 25, 26

Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3rd Cir. 1987). 12

Donovan v. Walton, 609 F. Supp. 1221 (D.C.Fla. 1985). 10,.13

Hand v. Central Transport, Inc., 779 F.2d 8 (6th Cir. 1985). 20

Hartford Accident & Indem. Co. v. Chicago Housing Authority, 12 F.3d 92, 94-95 (7th Cir. 1993) 8

Lawrence v. Northrop Corp., 980 F.2d 68 (1st Cir. 1992). 18

Lewis v. AT&T Technologies, Inc., 691 F.Supp. 915 (D.Md. 1988) 12

Lohorn v. Michal, 913 F.2d 327
(7th Cir. 1990). 22

Matsushita Electric Industrial Co. v.
Zenith Radio Corp., 475 U.S. 574,
106 S.Ct. 1348 (1986). 14

Palucki v. Sears, Roebuck &, Co.,
879 F.2d 1568 (7th Cir. 1989). 18

Rollins v. TechSOUTH, Inc.,
833 F.2d 1525 (11th Cir. 1987). 13

Ross v. Communications Sattelite
Corp., 759 F.2d 355 (1985). 7,13

Saint Mary's Honor Center v. Hicks,
113 S.Ct. 2742 (1993). 17,
23, 25

Shager v. Upjohn Co., 913 F.2d 398
(7th Cir. 1990). 21

Siegel v. Alpha Wire Corp.,
894 F.2d 50 (3rd Cir. 1990). 7, 12

Weldon v. Kraft, Inc.,
896 F.2d 793
(3rd Cir. 1990). 13, 18, 20, 22

B. Statutes

Federal Rules of Civil Procedure,
Rule 56 . . . . . 14, 15

29 U.S.C. Sections 621-634 . . . . 3, 5

Petitioner, Doyle C. Alley, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit granting Respondent's Motion for Summary Judgment. In so holding, the Court itself made determinations as to the strength of evidence presented rather than leaving such matters to the trier of fact, notwithstanding the fact that Petitioner presented sufficient indirect evidence to demonstrate pretext and therefore prove his prima facie case.

Petitioner urges the Court to clarify its position on nonmovant's burden in opposing summary judgment motions, in light of the Court's rulings in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986), and related cases. It is Petitioner's position that Celotex, at least in some circuits, is being employed contrary to public policy and the original intention

of this Court. Some circuits require that, once pretext is shown, plaintiff must go one step further and provide direct evidence of discrimination, rather than simply showing that the trier of fact could, but may not necessarily, find discriminatory intent via the indirect evidence presented. Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994). In many cases, Celotex has been used as a vehicle for defeating hard-to-prove civil rights claims without allowing the plaintiff to reach the merits of his case.

OPINIONS BELOW

The opinion of the Court of Appeals in Schultz and Alley v. General Electric Capital Corp., (7th Cir. 1994), appears in Appendix A to this Petition. The written opinion of the District Court for the Northern District of Illinois, Eastern Division, appears in Appendix B to this Petition. The Order denying Petitioner's

Request for Rehearing by the Court of Appeals for the Seventh Circuit appears in Appendix C hereto.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on October 5, 1994. A timely Petition for Rehearing en banc was filed. The Court of Appeals' denial of the Petition for Rehearing and Suggestion for Hearing en banc was issued on November 10, 1994 and is set forth in Appendix C. This Court has appellate federal question jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act (1967), 29 U.S.C. Sections 621-634.

STATEMENT OF THE CASE

Because this case revolves around the concept of Summary Judgment, a brief statement of the facts is included herein.

On July 20, 1990, Petitioner was laid off from his position as a District

Marketing Manager (Southeast Region) with GE Capital Corporation (hereinafter "GE"). His severance package was one offered only to employees whose performance was satisfactory (Record at 82, Labrozzi Dep. at 221). The lay-off came a scant seven and one-half months after Petitioner was offered and accepted said position with GE. The offer had been made in conjunction with a buy-out by GE of Petitioner's former employer, TCF Commercial Leasing Corporation (hereinafter "TCF"), and the limited positions available were offered on the basis of individual volume results over the past two or three years and personal interviews (Record at 82-3, Wexler Deposition at 70). Petitioner, then fifty-seven years old and an employee in good standing, was replaced in part by Susan Kennedy, a twenty-seven year old woman. Record at Defendant's Depo. Ex., Alley #6.

Petitioner brought suit in the United States District Court, Northern District of Illinois, Eastern Division, alleging, among other things, age discrimination pursuant to the Age Discrimination in Employment Act, 1967, 29 U.S.C. Sections 621-634. The Court had appellate federal question jurisdiction. At the District and Appellate Court levels, Petitioner's case was consolidated with that of another former TCF/GE employee who also had an ADEA claim, Hubert O. Schultz. Mr. Schultz is not seeking a writ of certiorari, and his claims are no longer consolidated with this case. Petitioner is acting pro se.

At the close of Discovery, Respondent submitted a Motion for Summary Judgment which subsequently was granted. A Memorandum of Opinion was issued by the Court on August 19, 1993, and stated in support of its ruling that during May and June 1990 GE determined that it needed a

reduction in the TCF sales force. Regional Managers were instructed to target those employees suitable for layoff. (Record at 68, Deposition of Farmer at 99). The Court accepted Respondent's unsubstantiated assertions of Petitioner's poor performance (Farmer Dep. at 211) as a sufficient business reason for Petitioner's lay-off. However, the explanation of poor performance is contrary to the record (therefore, potentially pretextual) and this conflict, coupled with the question of whether Petitioner's duties were assumed in large part by a twenty-seven year-old woman, presented matters appropriate for the trier of fact to determine. The Court cited Celotex Corp. v. Catrett, 477 U.S. 317 (1986) and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) to state that Summary Judgment is proper as a matter of law where no material issue of fact exists. The question is, however, can the Court ignore

what it considers to be weak indirect evidence in holding that there is no issue of fact -- thereby bypassing the function of the jury? Petitioner urges the Court to find that it cannot, and that such was not the intent of Celotex, et al. See Ross v. Communications Satellite Corp., 759 F.2d 355 (1985); and see Siegel v. Alpha Wire Corp., 894 F.2d 50 (3rd Cir. 1990).

Petitioner then file Notice of Appeal with the United States Court of Appeals for the Seventh Circuit. At this point, Petitioner had depleted his funds and therefore continued his matter Pro Se at the Appellate level.

Petitioner argued, in part, that the District Court erred in granting Summary Judgment; that Petitioner was a member of the protected class, was replaced by a younger person, and had demonstrated by indirect evidence that the business reasons offered by Respondent were not credible on

their face and in conflict with one another; therefore, Petitioner argued that he had met his prima facie case and as a result had presented a material issue of fact for the jury to decide.

The Seventh Circuit, possibly hindered by Petitioner's Pro Se approach to the appeal, failed to look at the record as a whole and simply reiterated the consolidation of territory and poor performance explanations offered by Respondent. See Hartford Accident & Indem. Co. v. Chicago Housing Authority, 12 F.3d 92, 94-95 (7th Cir. 1993). Recognizing that an indirect approach was being taken to show pretext, the Court nevertheless stated:

"General Electric has offered ample evidence that it terminated these two individuals for performance deficiencies. In Alley's case, it was an inability to close deals... With respect to both employees, General Electric has clearly explained the terminations with legitimate, non-discriminatory reasons..."

(Appellate Opinion at 7). [1]

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[1] The record contains ample evidence that Alley's performance was satisfactory and that all people hired from TCF experienced similar frustration in closing deals. During the period of reorganization, Alley continued to reach agreements with prospective customers; his "inability to close" was instead reflective of GE's hesitancy to approve the financing for such agreements. (Record at 82-3, Wexler Dep. at 174). Such agreements were nearly identical to those which had rendered TCF attractive at the time of its purchase by GE, and the credit department's failure to approve transactions as before resulted in an enormous backlog of pending deals. (Record at 82-1, Davis Dep. at 162). While Petitioner's funded deals were low in volume, his backlog was large. Respondent used the funded figures as evidence of Petitioner's "poor" performance. (Record at 68, Farmer Dep. at 247).

Respondent itself admitted that GE did not know much about the franchise aspect of the leasing business (TCF's specialty) at the time the TCF people were hired. (Record at 68, Baraco Dep. at 90; Record at 82-1, Davis Dep. at 162). Respondent also admitted that at the time of TCF's purchase it already had a division performing a similar function, and was aware of this fact. (Record at 82-3, Wexler Dep. at 96) and thus presumably took steps to prevent the overlap later cited as one reason for the reduction.

Furthermore, Russ Davis, who had been Petitioner's supervisor at TCF had requested a higher salary for Petitioner at the time he was brought over from TCF. (Records at 68, Wexler Dep. at 111). Davis, under whom

The Seventh Circuit further found that Petitioner had failed to present "any evidence that would permit a trier of fact to find that General Electric's reason for terminating [him], poor performance, is unworthy of credence." (Appellate Op. at 11). However, had the Court examined the record as a whole, the pretextual nature of Respondent's business reasons for the layoff would have become apparent. Since reasonable minds could differ, this clearly was a question for the jury. Donovan v. Walton, 609 F.Supp. 1221 (D.S.Fla. 1985). It is Petitioner's position that in looking for pretext the Court should have viewed the record as a whole, and should not have used its search for pretext as a means to circumvent the fact-finding role of the

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Alley had worked prior to the acquisition, testified that he had "no problem with [Petitioner's] performance as a sales rep whatsoever." (Record at 82, Davis Dep. at 1078.)

jury. Once a conflict was shown between the reasons given and the record, it was up to the jury to determine the strength or weakness of Petitioner's case.

REASONS FOR GRANTING THE WRIT

A conflict exists, by implication, between prior rulings of this Court and the decisions of several Circuits, including the Opinion below. Furthermore, this same conflict exists within various Circuits themselves concerning this Court's interpretation of proof required from a nonmovant responding to a Summary Judgment motion. In cases in which civil rights violations are alleged, Summary Judgment should be particularly disfavored and the Court should not, in determining whether a prima facie case has been met and a material issue of fact shown, usurp fact-finding functions which are properly within the domain of the jury -- even in cases in which such evidence appears ultimately to be weak.

Lewis v. AT&T Technologies, Inc., 691 F.Supp. 915 (1988) (Once court has determined that there is sufficient evidence to make out a prima facie case of employment discrimination, then evidence of nondiscriminatory reason for discharge does no more than pose factual issue for fact finder to resolve); Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (1987) (The district court should have considered whether evidence of inconsistencies and implausibilities in employer's proffered reasons for discharge reasonably could support inference that employer did not act for nondiscriminatory reasons, not whether evidence necessarily led to conclusion that employer acted for discriminatory reasons. The district court erred in weighing competing inferences in resolving disputed facts.); Siegel v. Alpha Wire Corp., 894 F.2d 50 (1990) (district court erred in deciding summary judgment motion when it

drew inferences from evidence, resolving for itself issues which should have properly been left to a jury to decide); Ross v. Communications Satellite Corp., 759 F.2d 355 (1985) (even where a directed verdict would be proper after hearing the evidence, district court should not try the case in advance by summary judgment); Donovan v. Walton, 609 F.Supp. 1221 (D.C.Fla. 1985) (if reasonable minds might differ on inferences arising from undisputed facts, court should deny summary judgment); Weldon v. Kraft, Inc., 896 F.2d 793 (3rd Cir. 1994) (in order to withstand motion for summary judgment, employment plaintiff need not carry the burden of persuasion); Rollins v. TechSOUTH, 833 F.2d 1525 (11th Cir. 1987) (material issue of fact existed as to whether discharged employee was replaced, so that employee met her burden regarding pretext, and grant of summary judgment was improper).

This Court has held that a nonmovant responding to a summary judgment motion must do more than simply rely on the pleadings to demonstrate that a genuine issue of material fact exists. Celotex v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, 477 U.S. 242 (1986); and Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). The Court stated:

> According to respondent's argument, since petitioner did not "support" its motion with affidavits, summary judgment was improper in this case. But as we have already explained, a motion for summary judgment may be made pursuant to Rule 56 "with or without supporting affidavits." In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on

> file," designate "specific facts showing that there is a genuine issue for trial. 477 U.S. at 324.

This Court was concerned about situations in which movants for summary judgment would bear an increased burden in showing that there is an absence of evidence to support the nonmoving party's case.

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate the manner provided by the Rule, prior to trial that the claims and defenses have no factual basis. 477 U.S. at 327.

Unfortunately, the result of this clear-cut holding has been confusion that has resulted in an equally unfair burden on the nonmoving party.

The confusion is particularly acute in cases involving issues of motive and intent, such as discrimination cases. In discrimination cases lacking direct evidence, a plaintiff must make a prima

facie showing that he: (1) is a member of a protected group (here, that Plaintiff is over forty years old); (2) he was doing his job well enough to meet his employer's legitimate expectations (the record clearly shows there is evidence, though in question, to support this); (3) that he was discharged; and (4) the employer sought a replacement for him. Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994).

Once the prima facie case is made, a rebuttable presumption of discrimination exists and the employer must articulate a legitimate, nondiscriminatory reason for the employee's discharge. Anderson at 1122. In the present case, the alleged reasons are overlapping territories, a resulting reduction in force, and (alleged only after initiation of this action) poor performance on the part of Petitioner.

A showing that such business reasons are not credible (i.e., pretextual) is then required of the plaintiff. Against the backdrop of Celotex, the issue of pretext and the amount of proof sufficient to demonstrate or overcome it, has resulted in conflicting rulings when a motion for Summary Judgment is made.

Understandably, this Court has sought to protect defendants against baseless claims by providing that in certain situations a defendant accused of discriminatory actions may prevail on a motion for summary judgment. In Saint Mary's Honor Center v. Hicks, 113 S.Ct. 2743 (1993), this Court held that even where plaintiff makes his prima facie case and the proffered reason is not persuasive, plaintiff nevertheless bears the burden of persuading the trier of fact that defendant intentionally discriminated against him. Of course, this burden would be born at trial

rather than in response to a summary judgment motion. Weldon, supra at 797. In discrimination cases where direct evidence is lacking, this simply means that plaintiff must show pretext and some evidence of discriminatory intent.

However, the result of Celotex has been for some courts to require direct evidence of discriminatory intent -- in addition to a showing of pretext -- in order to rebut a defendant's mere statement that legitimate business reasons existed. And it is at this point that the discrimination defendant often moves for summary judgment. Palucki v. Sears, Roebuck & Co., 879 F.2d 1568 (7th Cir. 1989) (court must decide whether state of evidence is such that, if case were tried tomorrow, plaintiff would have fair chance of obtaining verdict; if not, motion should be granted and case dismissed); Lawrence v. Northrop Corp., 980 F.2d 66 (1st Cir. 1992) (it is not enough for plaintiff merely to

cast doubt upon employer's justification for its employment actions; plaintiff must point to evidence which could raise inference of discriminatory motive underlying pretextual explanation); Billups v. Methodist Hospital of Chicago, F.2d 1300 (7th Cir. 1991) (nonmovant may not rest on the pleadings, but must affirmatively demonstrate specific factual allegations that genuine material fact exists for trial, on motion for summary judgment). In such courts it is nearly impossible for a discrimination plaintiff to overcome a summary judgment motion made immediately after defendant has offered a business reason for its action. While the rights of defendants surely must be protected, the rights of nonmovant plaintiffs should be of no less consequence.

Courts have recognized that the relative disadvantage of a plaintiff should, at least to some extent, be a consideration. In Caldwell v. Miller, 790 F.2d 589 (7th

Cir. 1986), the Court held that pro se litigants should not be held to the more stringent applied to formally trained attorneys. In Hand v. Central Transport, Inc., 779 F.2d 8 (6th Cir. 1985), the court noted that summary judgment should be particularly disfavored in anti-trust cases. And in Weldon v. Kraft, 896 F.2d 793, 800 (3rd Cir. 1990), the court stated: "Discriminatory conduct is often subtle and difficult to prove. For this reason, our legal system permits discrimination plaintiffs to prove their cases with circumstantial evidence."

Refusal to find a genuine material issue of fact often occurs not because a matter is truly baseless, but instead because the court is looking beyond the existence of issues and is seeking to relieve its docket from matters it considers to be weak.

> The growing difficulty that district judges face in scheduling civil trials, a difficulty that is

> due to docket pressures in general and to the pressure of the criminal docket in particular, makes appellate courts reluctant to reverse a grant of summary judgment merely because a rational fact finder could return a verdict for the nonmoving party if such a verdict is highly unlikely as a practical matter because the plaintiff's case ... is marginal ... A judge's decision to grant a motion for summary judgment may be a good predictor of the outcome of a bench trial before the same judge; it may not be a good predictor of the outcome before a jury.

Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990).

And yet that is precisely what the Seventh Circuit itself did to Petitioner.

Here, the Seventh Circuit ignored unsettled material factual issues in the record, particularly regarding performance. "An employee's own self-serving remarks standing alone are insufficient to raise doubt as to the credence of the employer's explanation for termination." (Appellate Opinion at 9) However, the responsibility of the Court of Appeals is to review de novo

a District Court's grant of summary judgment. Lohorn v. Michal, 913 F.2d 327 (7th Cir. 1990). In certain situations the testimony of a discrimination plaintiff, standing alone, has been found capable of withstanding a summary judgment motion. Weldon v. Kraft, 896 F.2d 793 (3rd Cir. 1990). And a de novo review of the record would have revealed conflicting testimony -- from various witnesses -- on the issue of Petitioner's performance.

The Opinion of the Seventh Circuit below and similar holdings creates a conflict among the Circuits with regard to whether a showing of pretext in discrimination cases requires direct proof of discriminatory intent and the degree of such proof required to overcome a motion for Summary Judgment. In Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994), this conflict is in part discussed.

> The federal courts, however, have not been entirely clear on what constitutes a showing of pretext.

> Three competing rules have been developed ... Under the pretext-only rule, if the plaintiff can successfully show that the reasons proffered by the employer for her discharge are factually false, then she is automatically to a judgment in her favor ... The second approach is a version of the pretext-only rule that has been adopted by this circuit. Under this rule, if the employer offers a pretext -- a phony reason -- for why it fired the employee, then the trier of fact is permitted, although not compelled, to infer that the real reason was age ... The third variation is "pretext-plus." The "pretext-plus courts require more than a simple showing that the employers' proffered are false. They require both a showing that the employer's reasons are false and direct evidence that the employer's reasons were discriminatory.
> 13 F.3d at 1122-23.

The court above noted that the mere showing of pretext approach was rejected by this Court in Saint Mary's, supra. Petitioner urges the Court to further clarify its position by further rejecting the pretext-plus-direct evidence approach. This would prevent discrimination plaintiffs from losing their day in court simply because

their evidence of pretext is indirect, and would reserve the determination as to the strength or weakness of plaintiff's case for the trier of fact.

The use of Celotex to force nonmovant, particularly when he or she is the plaintiff in a civil rights action, to present what amounts to a mini-trial, complete with direct evidence (as here), at a very preliminary point in the case, is condemned by most commentators. See McGinley, "Credulous Courts and the Tortured Trilogy: The Improper use of Summary Judgment in Title VII and ADEA Cases," 34 Boston College Law Review 203 (March 1993); Nelken, "One Step Forward, Two Steps Back: Summary Judgment After Celotex," 40 The Hastings Law Journal 53 (November 1988); Parliman and Hill, "Third Circuit law on Summary Judgment in the Area of Employment Discrimination," 20 Seton Hall Law Review 786 (1990); Busemeyer, "Summary Judgment and the ADEA

Claimant: Problems and Patterns of Proof," 21 Connecticut L. Rev. 99 (1988); "Overruling Tradition: Summary Judgment in the Eleventh Circuit After 1986," 41 Mercer L. Rev. 737 (1990).

This Court should take the opportunity to clarify its holdings in Celotex v. Catrett, supra, and related cases, relied upon by the Seventh Circuit below, particularly in light of this Court's recent decision in Saint Mary's, supra. Although Saint Mary's was helpful in demonstrating that the trier of fact may find pretext based on indirect evidence in discrimination cases, it did not preclude courts from nevertheless requiring direct evidence of discriminatory intent from nonmovants who seek to demonstrate pretext. Anderson v. Baxter Healthcare Corp., supra. Although the Opinions below do not explicitly so state, both Courts, in disregarding the ample evidence in the record as to the

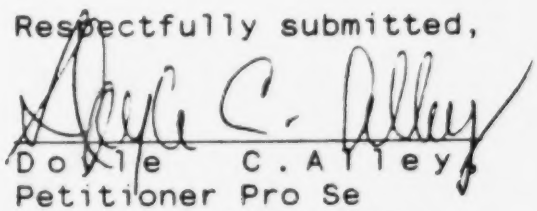
incredulity of Respondents' business reasons for the lay-off, apparently sought direct evidence to support a finding of pretext. Petitioner urges the Court to find that this is error, and contrary to Celotex, et al.

The Court should grant certiorari here to explicitly rule that in cases where nonmovant is at a distinct factual and economic disadvantage, as in the case of discrimination or antitrust litigation, particularly when nonmovant is pro se, direct evidence should not be required as evidence of pretext and the trier of fact rather than the Court should make the determination as to whether indirect evidence gives rise to a finding of pretext. Such a determination by this Court would resolve the conflict between the Circuits illustrated by the Seventh Circuit's decision in this matter.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

Respectfully submitted,



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Dated: May 8, 1995

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Nos. 93-3273 & 93-3321

HUBERT O. SCHULTZ and DOYLE C. ALLEY,

Plaintiffs-Appellants,

vs.

GENERAL ELECTRIC CAPITAL CORPORATION,

Defendant-Appellate

Appeal From the United States District court for the Northern District of Illinois, Eastern Division
No. 91 C 788-Brian Barnett Duff, Judge

ARGUED JUNE 6, 1995 - DECIDED OCTOBER 5, 1994

Before ENGEL,* BAUER, and FLAUM, Circuit Judges

BAUER, Circuit Judge. Herbert Schultz and Doyle Alley were both terminated by General Electric Capital Corporation in 1990. They brought this suit pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §§ 623(a), 625(b), claiming that each was terminated because of his age. General

Electric made a motion for summary judgment, which the district court granted. Schultz and Alley appeal the district court's decision, and we affirm.

* The Honorable Albert J. Engel, Judge of the United States Court of Appeals for the Sixth Circuit, is sitting by designation.

I. Facts

General Electric Capital Corporation operates a division, Vendor Equipment Financing (VEF), that provides financing to equipment manufactures, distributors, and franchisees through equipment leasing and financing programs. Its principal customer base consists of franchisees of national franchisors, such as Hardees and Dunkin' Donuts. This whole business began in lat 1989 when VEF purchased the accounts of the Transamerica Commercial Finance Corporation in the fast-food and lodging industries. Under the sales agreement, VEF agreed to offer employment to sixty Transamerica employees. Schultz and Alley were two of the

Transamerica employees hired by VEF at this time.

A. Alley's Employment Situation

Alley was hired by Randolph Wexler, VEF's Manager of Marketing, to perform the role of District Marketing Manager. Alley's main responsibilities were to solicit and obtain lease agreements with individual franchisees of national lodging or fast-food franchisors. He began with VEF on December 4, 1989, at the age of 57.

From the beginning of his tenure, Alley did not perform as well as his peers. By April, Alley's boss has sent him a memorandum instructing him that he "better get some [sales] numbers in here or we're all going to be history." Alley responded to that memorandum with one of his own that stated "I accept your reprimand concerning poor volume ... If I can't get things going you won't need to fire me, I'll resign. If I can't be

productive for this company, I'll find one I can be successful with."

In May 1990, VEF decided to consolidate two geographically overlapping sales units into one sales force. At that time, Alley met with his newly named regional supervisor, Otis Farmer, who told Alley that his performance was substandard. Alley admitted to Farmer that his sales quota was fair and that the sales volume report accurately reflected his current sales numbers. In light of these numbers, he even expressed concern to Farmer regarding possible layoffs resulting from the corporate reorganization.

Alley's performance deficiencies did not permit him to keep his promise to quit before being fired. To carry our the corporate plan, Farmer was asked by his supervisor to recommend two of the sixteen District Marketing Managers for layoff. Farmer, then age 45,was not given any guidelines to make

this decision. He determined that the two District Marketing Managers with the lowest "funded sales volume" (by all accounts, the most significant measures of success in VEF) would be recommended for layoff. As one might surmise, Alley, along with Kyle Smith (age 27), was the low man on the totem pole. Alley's poor performance, along with other negatives contained in Alley's personnel file, made it clear to Farmer that Alley must be recommended for layoff. Farmer's superior accepted his recommendations, and both Alley and Smith were laid off.

B. Schultz' Employment Situation

Hubert Schultz, formerly Transamerica's National Franchise Account Manager, was hired by VEF on December 4, 1989, as a National Account Manager. Randolph Wexler hired Schultz for VEF to provide expertise in fast food franchising and put Schultz in charge of developing the franchise business, educating

VEF salesman to understand and develop the franchise business, and closing business deals with national franchisors whose products VEF would then offer to finance for approved franchisees. Schultz reported directly to David Labrozzi, Manager of the National Accounts Program, who reported to Wexler.

Like Alley, Schultz did not get off on the right foot. At Schultz's very first sales meeting on January 21, 1990, he was to present detailed information on how to market and close transactions in the fast-food franchise industry. It turns out that Schultz simply described his extensive contacts in the industry and told war stories. Wexler was looking for more and told Labrozzi so; Labrozzi passed Wexler's feedback along to Schultz. At the next scheduled meeting, on February 21, 1990, Schultz was to present in the credit

department detailed information to help them understand the franchise business and how to resolve credit issues. Instead, Schultz again "regaled" his audiences with stores of his personal contacts, he also failed to answer questions put to him in this meeting. Understanding that VEF wanted to generate new business in the franchisee industry as soon as possible, Schultz sent Labruzzi a memorandum dated February 8, 1990, in which he identified those franchisors that required his immediate attention. Schultz, however, did not submit the necessary information regarding these high priority franchisors to the credit department for about three months. In addition, early in February, Labarozzi requested of Schultz several franchisor's uniform franchise offering circulars; these circulars are prospectuses that a franchisor submits in the marketplace for consideration by potential franchisees and are referenced

in the industry by the acronym "UFOC." Labrozzi believed that UFOCs were necessarily evaluated before meeting with a particular franchisor and requested UFOCs of high priority franchisors from Schultz. Schultz stalled on this request, at one time complaining to Labrozzi that UFOCs were not that important, before finally complying with Labrozzi's request at the end of March.

One of these UFOC's that Labrozzi had requested was for Dunkin' Donuts, with which Schultz had scheduled a sales call for March 27, 19990. Wexler, Schultz and three other VEF employees attended this meeting. Wexler felt that Schultz was unprepared, did not understand the business issues, could not answer questions, and "embarrassed the company." Wexler conveyed his feelings to Labrozzi in no uncertain terms.

Over Schultz's first four months with VEF, Labrozzi had communicated to Schultz several

times over the phone his displeasure with Schultz's performance with respect to certain issues. By april 1990, Labrozzi had concluded that Schultz had failed to perform certain tasks that Labrozzi considered critical in VEF's success in that market. Labrozzi met with Wexler to discuss Schultz's problems, and Wexler told Labrozzi to meet with Schultz to discuss his deficiencies. On April 11, 1990, Labrozzi met with Schultz and told him that Schultz had not submitted important franchisors' files for credit approval; was not "driving the business" (selling aggressively); was not closing enough deals; and was unaccepting (in Labrozzi's estimation) of VEF's credit standard. Schultz responded by complaining that VEF's credit department was deficient and was to blame for Schultz's low business volume. He also blamed the credit department for holding up the closing of the Tony Roma's

account, but later admitted to Labrozzi that he had failed to provide information he knew was necessary for approval. Subsequent to this meeting, Schultz did submit information for important franchisors, but not for several weeks after the meeting.

In May, Labrozzi determined that Schultz must be terminated because he was unable or unwilling to improve his performance. Labrozzi informed Wexler of his decision and explained his reasons. Wexler agreed with Labrozzi, but recommended that Labrozzi discuss Schultz's termination with the human resources manager, Walter Conley. Labrozzi did this, explaining to Conley each of Schultz's miscues and Schultz's inability to improve.

Finally, Labrozzi met with Schultz and terminated him for unsatisfactory performance. Labrozzi informed Schultz that he was to be paid through August and could

keep his company car through June. Predictably, Schultz was displeased. He complained that he had forfeited severance benefits from Transamerica, demanded a greater severance package from General Electric, and threatened legal action. Labrozzi told Schultz that he would discuss his severance package with the human resources manager, but that he could not give him an employment reference because Schultz was being terminated for poor performance.

Labrozzi met with Conley again to discuss Schultz's severance package. Labrozzi informed Conley that he was terminating Schultz for poor performance, and for that reason, he could not transfer Schultz to another position with VEF. Conley informed Labrozzi that terminated employees are not entitled to any severance pay or benefits, but that he would explore other options.

Labrozzi and Conley discussed Schultz's situation several times over the telephone over the next several weeks. In early June, Conley had determined that, from an administrative perspective, if VEF characterized Schultz's termination as a layoff, VEF could offer Schult some termination benefits. As a result, conley sent Schultz a letter informing him of his termination benefits and characterizing the termination as a layoff. In response, Schult accepted the benefits, but wrote Labrozzi a letter in which he state: "It is curious to note that you are now calling my dismissal a 'layoff' when in fact on May 22, 1990, you called it a 'termination' because of performance."

II. Analysis

We review a district court's grant of summary judgment de novo to determine whether the record reveals that there i no genuine

issue as to any material fact and General Electric is entitled to a judgment as a matter of law. See Hartford Accident & Indem. Co. v. Chicago Housing Authority, 12 F.3d 92, 94-96 (7th Cir. 1993). In addition, we view the record and draw all inferences from it in the light most favorable to Schultz and Alley.

Because neither employee has presented any direct evidence that age was the determining factor in their respective discharges, they have relied on the burden-shifting method of proof as set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and applied to ADEA cases. See McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 371 (7th Cir. 1992). The first requirement of this burden-shifting methodology is that the employees must establish a prima facie case of age-based discrimination. Here, the district court presumed a prima facie case, and

General Electric has admitted one.[1] The establishment of the prima facie case creates a rebuttable presumption of discrimination and shifts the burden of production to the employer to articulate a legitimate, nondiscriminatory reason for the employee's discharge. Anderson v. Baxter Healthcare Corp., 13 F.2d 1120, 1122 (7th Cir. 1994).

If the employer successfully explains its reasons for the termination, the presumption dissolves, and the burden shifts back to the employee to show that the employer's proffered reasons are a pretext for age discrimination. Id. (citing, Weihaupt v. American Medical Ass'n, 874 F.2d 419, 426-27

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1 General Electric has clearly conceded a prima facie case to Schultz. Its position with respect to Alley is less clear. Since, in our view, this case turns on the issue of pretext and because the result is the same with respect to Alley's claim, we will operate on the presumption that General Electric has conceded a prima facie case to Alley.

(7th Cir. 1992). General Electric has offered ample evidence that it terminated these two individuals for performance deficiencies. In Alley's case, it was an inability to close deals. In addition to the report of funded sales volume on which Farmer relied, Alley himself admitted to poor performance. With respect to Schultz, General Electric has offered detailed evidence in the form of deposition testimony by Wexler and Labrozzi corroborated by Schultz's deposition testimony that Schultz was a poor performer. With respect to both employees, General Electric has clearly explained the terminations with legitimate, non-discriminatory reasons, and as a consequence, the burden has shifted back to the employees to demonstrate that General Electric's reasons are a pretext.

Schultz devotes a great deal of space in his brief to arguing the effect of the Supreme

Court's decision in Saint Mary's Honor Ctr.v. Hicks, 113 S.Ct. 2742 (1993), on our analysis of pretext in the employment discrimination context. We, too, have devoted a great deal of space to that very issue. We did it, however, in another case - the aforementioned Anderson v. Baxter Healtcare Corp., 13 F.2d 1120, 1122-24 (7th Cir. 1994). We will not rehash that discussion since we believe that, despite the lapse of a few months, it retains a great deal of its vitality, but we will restate our conclusion; at the summary judgment stage, the non-movants must "'product evidence from which a rational factfinder could infer that the company lied' about its proffered reasons for [the employees'] dismissal." Id. at 1124 (quoting Shager v. Upjohn Co., 913 F.2d 398, 401 (7th Cir. 1990). Neither Schult nor Alley has done so.

In his attempt to demonstrate pretext, Alley argues that the report on which Farmer relied may not have been the most accurate indicator of performance. In addition, he argues that any performance problems were not his fault, but were caused by inefficiency or incompetence in the credit department. These arguments do not properly address the issue of pretext in this case and, as a result, do not raise a genuine issue of material fact. Alley points to other reports as better indicators of performance, which are not in the record. Even if we accept Alley's characterizations of these reports, his reliance on them to demonstrate that General Electric's reasons for Alley's termination are pretextual misses the point. "There is a fine line between evidence that appropriately challenges the employer's proffered reasons as being unworthy of credence and evidence that merely shows that

the employer made a mistake or a bad business judgment." Kralman v. Illinois Dep't of Veterans' Affairs, 23 P.3d 150, 156 (7th Cir. 1994). If Alley's contentions are taken as true, he has offered evidence of the latter, while his burden is to prove the former. These "other" reports may say several things, but what they do not say is that Farmer knew that his reliance on the "funded sales volume" report was invalid. Alley might have been able to meet his burden if he could prove, for example, that Farmer had thought the report to be erroneous or that he believed "funded sales volume" was an irrelevant performance criterion; such evidence would permit a factfinder to find that Farmer lied. But, it is irrelevant that a factfinder may find that Farmer erred in his assessment of Alley's performance. We do not question an employer's good faith

business decision. Billups v. Methodist Hosp. of Chicago, 922 F.2d 1300, 1304 (7th Cir. 1991).

For the same reasons, Alley again misses the mark with his complaint that his problems were not his fault, but the fault of the credit department. Attempts to shift blame are generally not useful in showing pretext. See Anderson, 13 F.3d at 1125 (citing Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1223 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1981). In this case, Alley's allegations of incompetence of others do nothing to demonstrate that General Electric is lying about the reasons for his termination.

Further support for General Electric's position is that there is nothing in the inferiority of the "funded sales volume" report or in the problems within the credit department that implicates age. Remember,

Alley is trying to prove age discrimination. The report is completely independent of age; indeed, the report indicated poor performanceon behalf of both Alley and Smith, a 27-year-old, who was also terminated. Also, to the extent that the credit department hindered Alley's efforts, it did so with all the other sales representatives. There is nothing in Alley's argument that indicates that General Electric's reasons are indicative of anything other than the legitimate exercise of business judgment.

Schultz's attempts to demonstrate pretest are similarly flawed. He admits that he provided UFOC's to Labrozzi long after Labrozzi had initially asked for them. He also admits that he failed to submit the necessary information regarding key franchisors until the end of April and early May. Schultz attempts to demonstrate, however, that Labrozzi lied about his belief

that Schultz was a poor performer by explaining his failing at the various meetings. This is not enough; an employee's "own self-serving remarks standing along are insufficient to raise doubt as to the credence of the employer's explanation for termination." Billups, 922 F.2d at 1303 (citing Weihaupt, 874 F.2d at 429). Schultz, then, has presented no evidence indicating that Labrozzi lied about his belief that Schultz was a poor performer, much less evidence that Schult was anything but a poor performer.

Next, Schultz argues that he has demonstrated pretext by showing that Labrozzi treated younger employees with performance problems better than he treated Schult. Around the time of Schult's termination, there were four other National Account Managers reporting to Labrozzi with performance problems: 1) Jim Welch, age 43,

an employee of two and one-half years; 2) Chris Hamer, age 40, also an employee of two and one-half years; 3) Vivian Malcy, age 39, an employee of five years; and 4) Richard Pitlock, age 35, an employee of one and one-half years. Schultz contends that these peers received warnings about their poor performance and probationary periods in which to improve; this, he says, indicates age discrimination and pretext, He is wrong.

First, only Malcy and Hamer received probations; Malcy received a sixty day probation, and Hamer got ninety days. Second, all four were treated identically to Schultz in that each either resigned or was fired for poor performance. Third, even if Schult's peers were treated slightly differently, their treatment can be explained on the basis of individual characteristics-tenure with the company or experience in the industry, for example. Fourth, Schultz

received direction and repeated warnings about his failure to perform; he either was incapable of heeding the warnings or simply ignored them. Nothing in Labrozzi's treatment of other poor performers can be read to evidence age discrimination or demonstrate that Labrozzi's reason for terminating Schultz was a lie.

Schultz's only other argument of note is that the description of his separation from General Electric as a layoff in the letter informing him of severance benefits demonstrates that he was not terminated for poor performance. In effect, Schultz attempts to turn around his good fortune of additional severance and use it as evidence of pretext; this attempt is for naught. General Electric has fully and adequately explained its reasons for describing Schultz's termination in that way. In addition, Schultz admits that Labrozzi told

him that he was being terminated for performance deficiencies. There is nothing in the characterization of his termination in this letter that can be construed as evidence of pretext. In raising this argument, we suppose that Schultz is trying to teach General Electric a lesson about going the extra mile to help a terminated employee, especially when that employee was a lousy one.

Finally, the state law claims raised by Schultz and Alley are completely without merit. To recapitulate, then, neither Schultz nor Alley has presented any evidence that would permit a trier of fact to find that General Electric's reason for terminating them, poor performance, is unworthy of credence. Consequently, the district court's order is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DOYLE C. ALLEY and HUBERT O. SCHULTZ,	)	
Plaintiffs,	)	
v.	)	No. 91 C 0788
GENERAL ELECTRIC CAPITAL CORP.	)	
Defendant.	)	

MEMORANDUM OPINION

Plaintiffs Doyle C. Alley and Hubert O. Schultz have filed a multi-count complaint against General Electric Capital Corporation, which they allege that one or both of the plaintiffs were victims of age discrimination, fraud, misrepresentation, retaliation, and wrongful denial of ERISA-covered benefits. Six of the plaintiffs' twelve counts were previously withdrawn, and General Electric Capital Corporation has now filed a motion for summary judgment on the

remaining counts. For the reasons discussed below, the motion for summary judgment is hereby granted.

BACKGROUND

Vendor Equipment Financing ("VEF") is a division of defendant Electric Capital Corporation that provides sales financing for equipment manufacturers, distributors, and franchisees various industries. In December, 1989, VEF purchased a portion of the portfolio of accounts of TCF Commercial Leasing Corporation ("TCF"). Under the terms of the VEF-TCF stock purchase agreement (the "TCF Agreement"), VEF agreed to offer employment to 60 TCF employees.

Accordingly, in late summer 1989, VEF's Marketing Manager, Randolph Wexler, was asked to interview TCF sales employees and determine to whom jobs should be offered. Subsequently, Wexler interviewed both plaintiffs, and on October 20, 1989 sent to

each a letter offering employment. Schultz (age 53) and Alley (age 57) each accepted his offer by signing and returning the offer letter, and both commenced work on December 4, 1989. After this stage, the paths of Alley and Schultz diverged.

Schultz' Employment with VEF

Plaintiff Schultz was employed by VEF as a National Account Manager in its fast-food franchising segment. The duties of Schultz as a VEF National Account Manager were substantially similar to his responsibilities as a TCF National Account Manager, and included: developing new accounts, helping VEF understand and develop the franchise business, and closing business deals with national vendors.

Almost immediately after Schultz began at VEF, problems with his performance became apparent to both Wexler and Schultz' immediate supervisor, David Labrozzi, who was

the Manager of the National Accounts Program.[1] For example, in early 1990, Wexler asked Schult to give two presentations: one at a January 31st sales meeting, and the other at a February 21st franchise industry meeting. According to Wexler, at both meetings Schultz failed to present adequately the desired

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[1] In numerous instances, the plaintiffs either fail to deny facts asserted in VEF's Local Rule 12(m) statement (i.e., they merely assert that such facts are "immaterial") or the plaintiffs deny such facts but do so without citing any record evidence. In such instances, this court deems the plaintiffs to have admitted the relevant portions of VEF's 12(m) statement. See, e.g., Valenti v. Qualex, Inc., 970 F.2d 363, 368-369 (7th Cir. 1992:

"This court has upheld the strict application of Local Rule 12(n). Any facts asserted by the movant and not contradicted in the manner specified by the rule are deemed admitted. Moreover, a Rule 12 responsive statement that is a flat denial, without reference to supporting materials, or with incorrect or improper references, and containing irrelevant facts, has no standing under Rule 12(n)" (citations omitted).

information about which deals were "doable." Indeed, Schultz purportedly spent a great deal of time discussing people he knew in the franchise business, as well as "what the menu was at Perkin's Pancake House" (Wexler Dep. at 43). Labrozzi testified that while he believed that the first presentation by Schultz was "okay" (Labrozzi Dep. at 74), he was disappointed by the lack of detail in the second presentation (Labrozzi Dep. at 95).

Shortly after Schultz' undistinguished presentations, Wexler, Schultz, and two other VEF employees represented VEF at a sales call to Dunkin' Donuts. According to Wexler, Schultz came "unprepared to the meeting, was an embarrassment to the organization and didn't even begin to understand the issues at hand" (Wexler Dep. at 49). Wexler discussed the performance of Schultz at the Dunkin' Donuts sales call with Labrozzi, and expressed his embarrassment that the national

person who was responsible for the account (i.e., Schultz) was in the "back seat" while the local field sales representatives "carried" the meeting (Labrozzi Dep. at 174). At the suggestion of Wexler, on April 11, 1990, Labrozzi met with Schultz and expressed dissatisfaction with his performance,. Specifically, Labrozzi expressed dissatisfaction regarding Schultz' progress in obtaining uniform franchise offering circulars,[2] the length of time spent on a sales call to Popeye's, Schultz' usage of sales representatives to obtain information about certain accounts, Schultz' progress in submitting franchisor files for credit review, Schultz' slow acceptance of General Electric Capital Corporation's credit

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[2] Uniform franchise offering circulars are prospectuses submitted to the market place for consideration by franchisees.

standards, and Schultz' failure to "drive the business.

In mid-May, Labrozzi informed Wexler that Schultz' performance had not improved, and that the business was not going to succeed with Schultz "steer[ing] the helm of the franchising business" (Labrozzi Dep. at 143). Accordingly, Labrozzi recommended that Schultz be terminated, and Wexler concurred with this recommendation.

On May 22, 1990, Labrozzi informed Schultz that VEF was terminating him for unsatisfactory performance.

Alley's Employment with VEF

Plaintiff Alley was employed by VEF from December 4, 1989 to July 20, 1990 as a District Marketing Manager in the Southeast Region. As a VEF District Marketing Manager (i.e., a field sales representatives), Alley was responsible for soliciting and obtaining

lease agreements with individual franchisees and/or users.

In march, 1990, Thomas Mann was appointed Vice President and General Manager of VEF. At that time, VEF operated two completely independent sales and marketing forces. As a cost-cutting measure, Mann decided to consolidate these overlapping sales forces, and he appointed Henry Baroco (then age 46) to head the consolidated field sales force. In this capacity, Baroco assisted Mann in the reorganization and consolidation of the sales force.

In early June, 1990, Baroco asked each of the Region Sales Managers to review his existing sales force and to determine whether he could cover the territory with a small number of sales representatives. If so, then the Region Manager wa asked to make recommendations as to which sales repre-

sentatives in his territory could be laid off.

Otis Farmer, Southeast Region Sales Manager, was Alley's supervisor at that time. In response to Baroco's request, Farmer examined the funded sales volume produced by each District Marketing Manager in his region, and specifically reviewed figures showing submitted and funded volume of each District Marketing Manager through May 31, 1990. The data revealed that out of the 15 District Marketing Managers reporting to Farmer, the two with the lowest funded sales volume were Alley (age 57) and Kyle Smith (age 27). Alley's 1990 numbers reflected 12 funded applications totaling less than $243,000.00, compared to an average value of funded applications of $2,067,000.00 for the other District Marketing Managers. Farmer felt comfortable with the accuracy of these numbers because they were very close to the

45), Fred Cunningham (age 40) and Susan Kennedy (age 27).

On or about July 17, 1990, Alley filed a charge of age discrimination against VEF with the South Carolina Human Affairs Commission. Similarly, on or about October 11, 1990, Schultz filed a charge of age discrimination against VEF with the Illinois Department of Human Rights and an amended charge of both age discrimination and retaliation on April 23, 1991. Subsequently, Schultz and Alley jointly filed the instant complaint.

DISCUSSION

Rule 56(c) of the Federal Rules of Civil Procedure requires this court to enter summary judgment on defendant's motion "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

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Pg. 36b

individual's age. 29 U.S.C. §§ 623(a), 631 (a). The Seventh Circuit has clearly articulated the standard governing the determination of age discrimination claims as follows:

> [A] terminated plaintiff's ultimate burden in an age discrimination case is to prove that he was discharged because of his age. The plaintiff need not prove that age was the sole factor motivating the employe's decision, only that age was a determining factor in the sense that he would not have been fired but for the employer's motive to discriminate on the basis of age.

McCoy v. WGN Continental Broadcasting Co., 937 F.2d 368, 371 (7th Cir. 1992) (emphasis added); see also, Hazen paper Co. v Biggins, 113 S.Ct. 1701 (1993).

A plaintiff may use two possible methods to show age discrimination. First, "[he] may try to meet [his] burden head on by presenting direct or circumstantial evidence that age was the determining factor in [his] discharge." Oxman v. WLS-TV, 846 F.2d 448, 462 (7th Cir. 1988). Second, because finding

evidence of discriminatory intent may be extremely difficult, a plaintiff may also take an "indirect" route to proving such a claim. Perfetti v. First Nat. Bank, 950 F.2d 449, 451 (7th Cir. 1991). The indirect method is the "indirect, burden-shifting method of proof for Title VII cases originally set forth in McDonnell Douglas ... and later adapted to age discrimination claims under the ADEA." Oxman, 846 F.2d at 452. In the case at bar, neither plaintiff asserts that he can raise a material issue of fact through the direct method. Rather, each proceeds under the indirect, burden-shifting approach.

When using the burden-shifting approach, a plaintiff must first establish a prima facie case of discrimination by showing:

> (1) that he was within the protected age group; (2) that he was performing according to his employer's legitimate expectations; (3) that he was terminated; and (4) that others not in the protected class were treated more favorably.

Smith v. General Scanning, Inc., 876 F.2d 1315, 1318 (7th Cir. 1989) (footnote deleted); Oxman, 846 F.2d at 452-453. Establishing a prima facie case "in effect creates a presumption that the employer unlawfully discriminated against the employee." St. Mary's Honor Center v. Hicks, No. 92-602, slip op. at 3 (U.S. June 25, 19930 (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). The employer then bears the burden of articulating a legitimate, non-discriminatory reason for the employee's discharge. Oxman, 846 F.2d at 453. If the employer does this, then "the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven 'that the defendant intentionally discriminated against [him]' because of his

race."[3] St. Mary's, slip op at 8 (quoting Burdine, 450 U.S. at 253).

Although proof that the employer's preferred non-discriminatory reason is simply a pretext, along with the elements o the prima facie case, may suffice to show intentional discrimination, it doe not compel such a finding. Id. Rather, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Burdine, 450 U.S. at 253.

In the case at bar, neither plaintiff puts forth any evidence to show pretext, let alone intentional age discrimination.

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[3] Although St. Mary's was a Title VII case, "the standards of proof established to adjudicate cases arising under Title VII apply to cases arising under the ADEA." Boyers v. Flying Tiger Line Inc., 979 F.2d 291, 296 (2nd Cir. 1992).

A. Alley's Age Discrimination Claim

Assuming arguendo, that Alley has set forth a prima facie case, there is no evidence of discriminatory motivation or that VEF's proffered explanation for his discharge is merely a pretext. To the contrary, the evidence overwhelmingly supports VEF's asserting that Farmer decided to lay off Alley because of his low funded sales volume figures, as well as the indications in Alley's personnel file that his low sales figures were not simply a recent phenomenon. Alley's attempts to raise an issue as to the basis of Farmer's decision are unconvincing and not supported by the evidence.

Alley first asserts that Farmer "denies" that he selected Alley for lay off because of his performance. This assertion stems from a portion of Farmer's deposition where he explained that Alley was technically laid off, rather than terminated for performance

reasons (Farmer Dep. at 211). However, Farmer also testified that the reason why Alley in particular was selected for layoff was his poor performance (Farmer Dep. at 247). Hence, Alley misrepresents Farmer's testimony.

Alley next assets that the sales report which Farmer reviewed to ascertain the sales volume of sales representatives in the Southeast Region was "unlike any report ever utilized by Defendant, but certainly conflicts with Defendant's standard 'VEF report'" (Alley Br. at 4). Alley cites no record evidence in support of this argument. Furthermore, Alley testified that the figures in the May 31, 1990 report accurately reflected his funded sales volume.

Third, Alley contends that operational support problems were the source of his low sales volume. Assuming, arguendo, that this assertion is true, it does not undermine

Farmer's assertion that he honestly believed Alley's sales figures were low. At his deposition, Farmer explained that anyone can submit transactions to the credit department for approval, but that "it doesn't do the company any good to submit just a lot of transactions. It's the approvals and the funding that are the important categories" (Farmer Dep. at 104). Moreover, prior to recommending Alley for termination, Farmer examined more than just Alley's funded sales volume. Among other things, Farmer also examined Alley's personnel file, and noted both that Alley's sales figures at TCF were low and that Alley had written a memorandum to his prior supervisor at VEF in which he appeared to acknowledge having low sales figures. Furthermore, during a May, 1990 teleconference, Alley specifically told Farmer that "he would not be impressed with his [Alley's] numbers" (Alley Dep. at 444).

Thus, even if Alley's low funded sales figures were in part due to operational difficulties with the credit department, this does not raise an issue as to the genuineness of Farmer's belief that Alley's sales figures were low. Even if Farmer's belief was ill-informed or ill-considered, the inquiry of this court is limited to whether or not that belief was honestly held. Billups v. Methodist Hospital of Chicago, 922 F.2d 1300, 1304 (7th Cir. 1991). Alley was not put forth sufficient evidence to raise a material issue of fact on this point.

Fourth, Alley argues that the June, 1990 reorganization reduced the number of sales employees in the protected age group. This argument is meaningless for two reasons. For one reason, five of ten sales employees separated in May and June 1990 were under age 40. For another, since the lay off recommendations were made by the region

manages, the only relevant statistical inquiry as far as Alley is concerned involves the 15 District Marketing Managers supervised by Farmer. Of these 15, two were laid off: Alley and Kyle Smith -- age 27. Hence, Alley's statistics do not raise an inference of discriminatory motive.

Fifth, Alley's asserting that VEF hired individuals outside the protected class for openings that occurred after his lay off is immaterial to his ADEA claim. None of the sales or marketing employees laid off in June 1990 have been rehired -- regardless of their ages. Furthermore, Alley offers no evidence that he applied for any of these positions.

Sixth, Alley's assertion that he was treated differently than younger employees who had performance problems misuses the point. Since Farmer recommended that Alley be laid off as part of a reduction in force, the relevant inquiry is whether Alley's age was

the motivating factor behind Farmer's recommendation in a different context (i.e., not in the context of a reduction in force) who had different positions and different supervisors is not relevant to this inquiry.

Finally, Alley's asserting that "there is some question as to whether or not there truly was a layoff in June 1990" because VEF was "profitable" and because VEF filled "19 vacancies between June and December 1990" (Alley Br. at 5-6) is unsupported and irrelevant. Alley puts forth no evidence whatsoever regarding VEF's profitability during the relevant time period. Moreover, his asserting regarding the supposed 19 hirings between June and December 1990 is not supported by his own cited evidence. Of the 19 positions referenced in paragraph 142 of Schultz' 12(n) statement (on which Alley relies), only three refer to positions available from June through December 1990.

Furthermore, VEF's profitability is immaterial to its decision to reorganize and reconsolidate its sales force. Alley offers no evidence that the decision to reorganize was not a good faith business decision.

In sum, Alley provides no evidence that VEF's decision to lay him off was anything but a good-faith business decision. Because Alley has failed to show pretext, let along intentional discrimination, VEF's motion for summary judgment on Counts I and II as they pertain to Alley is hereby granted.

B. Schultz' Age Discrimination Claim

Like Alley, Schultz does not provide any direct evidence that age was the determining factor in his discharge. Thus, to prove age discrimination, Schultz relies on the burden-shifting method of proof. This court will assume, arguendo, that Schultz can formulate a prima facie case.

Nevertheless, Schultz' ADEA claim lacks merit because he proffers no evidence that Labrozzi's opinion of his performance was not genuinely held or that age played any part in Labrozzi's decision to terminate Schultz. Labrozzi was dissatisfied with numerous facets of Schult' performance, including his failure to promptly obtain needed information on pertinent accounts, his inability to properly allocate time and efforts to develop customer accounts, his failure to "drive" the business, and his lackluster sales presentations.

While Schultz denies that his work performance was poor, he must come up with some evidence to disprove the explanation offered by VEF, as well as put forth evidence that VEF intentionally discriminated against him because of his age. St. Mary's, slip op. at 8. Schultz fails to do this. His

unsupported, self-serving statements about his ability

> may create a material dispute should the employee's ability but do nothing to create a dispute about the employer's honesty -- do nothing, in other words, to establish that the proffered reason is a pretext for discrimination.

Gustovich v. AT & T Communications, Inc., 972 F.2d 845, 848 (7th Cir. 1992)/

Schultz' pretext arguments are no more persuasive than the similar arguments put forth by Alley.

First, even if the June, 1990 reorganization reduced the number of sales force employees in the protected class, the only relevant statistical inquiry (as far as Schultz is concerned) involves termination decisions made by Labrozzi, who was the person responsible for Schultz' termination. Prior to Schultz' termination, Labrozzi supervised six National Account Managers. Including Schultz, two of these six National Account

Managers (both of whom were over age 40) were terminated or laid off during the relevant time period.

This circumstantial, statistical evidence has no discernable relevance to the question of pretext, since Schult' statistics do not show discriminatory motive. As in Gustovich, this minute statistical sample may be consistent with age discrimination, but it is not evidence that age actually motivated VEF's decision to terminate Schultz. Gustovich, 972 F.2d at 851. Furthermore, this statistical sample is simply too small to support any inference of age discrimination. In disparate impact cases involving similar facts and statistical data, the Seventh Circuit "[has] almost uniformly rejected statistical conclusions based upon such small samples, especially in discharge

cases."[4] Soria v. Ozinga Bros., Inc., 704 F.2d 990, 995 (7th Cir. 1983) (court disregarded sample size of less than 15 employees); see also, Sengupta v. Morrison-Knudsen Co., Inc., 804 F.2d 1072, 1076 (9th Cir. 1986) (sample of only 28 employees disregarded in discharge case).

Second, contrary to Schultz' assertions, Labrozzi did not treat Schultz differently

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[4] The 7th Circuit has recently indicated that a disparate impact theory of liability is available under the ADEA. See, Fisher v. Transco Services-Milwaukee, Inc., 979 F.2d 1239, 1244 (7th Cir. 1992); but see, Hazen Paper Co. v. Biggins, 113 S.Ct. at 1706 (Supreme Court is undecided whether disparate impact may be applied under the ADEA_. In a disparate impact claim, "an employee must first show that an employer utilizes a particular employment practice that results in a disparate impact upon a protected class of workers." Fisher, 979 F.2d at 1245. Accordingly, in Fisher, the employee argued that the employer's program, "while having facially neutral criteria, fell more harshly upon [the employer's] older employees." Id. Schultz, in contrast, does not argue that VEF had a "facially neutral" policy that affected older workers disproportionately. Instead, Schultz only raises a disparate treatment claim.

than younger employees. All of the other National Account Managers who reported to Labrozzi and who had performance problems were either terminated or they resigned after being warned about their performance.

Third, regarding VEF's hiring practices following Schultz' termination, not only have none of the sales or marketing employees laid off in June 1990 been rehired, there is no evidence that Labrozzi rehired <u>any</u> individuals terminated by him for poor performance.

Fourth, Schultz' argument that he was "laid off" rather than "terminated" is irrelevant to the issue of whether or not he was discriminated against because of his age.

Fifth, it is immaterial that Labrozzi did not document Schultz' performance deficiencies in writing since it is undisputed that Labrozzi discussed Schultz' unsatisfactory performance with Schultz.

Finally, Schultz makes the identical argument as was made by Alley, including identical, unsupportive citations, about "whether or not there truly was a layoff in June 1990" (Schultz Br. at 10). This argument is not only unsupported, but also immaterial to the issue of whether Labrozzi's preferred explanation is a pretext.

The Seventh Circuit repeatedly has held that it "'[does] not sit as a super-personnel department that reexamines an entity's business decisions,'" and its purposes is not to "second-guess an employer's good faith business decision." Smith v. General Scanning, Inc., 876 F.2d 1315, 1321 (7th Cir. 1989). In the case at bar, the overwhelming evidence is that this decision to terminate Schultz was a good faith business decision. Accordingly, the motion for summary judgment on Counts I and II with respect to Schultz is granted.

II. Schultz' Fraud ad Misrepresentation Claim (Count IX)

Schultz' fraud claims under Illinois law is based on certain pre-hire representations by Wexler, as well as the May 18, 1990 organizational announcement regarding the consolidation and reorganization of VEF's sales force (Schultz Br. at 11). These statement are not sufficient evidence to withstand VEF's motion for summary judgment.

Under Illinois law, the elements of a fraudulent misrepresentation claim are as follows:

> "(1) a false statement of material fact, (2) knowledge or belief of the falsity of the party making it, (3) intention to induce the other party to act, (4) action by the other party in reliance on the truth of the statements, and (5) damage to the other party resulting from such reliance."

Board of Education v. A. C & S, Inc. 131 Ill.2d 428, 452 (1989). These elements must be proven by clear and convincing evidence. LaScola v. US Sprint Communications, 946 F.2d

559, 567 (7th Cir. 1991).

In the case at bar, Schultz has no evidence of a false statement of material fact. Under Illinois law, mere promises or opinions are not statements of material fact. LaScola, 946 F.2d at 567. Indeed, "[a] statement that merely expresses an opinion or that relates to future or contingent events, rather than past or present facts, does not constitute an actionable representation". West v. Western Casualty and Surety Co., 846 F.2d 387, 393 (7th Cir. 1988). In LaScola, for example, the plaintiff asserted that certain statements by his employer were a fraudulent manipulation to get him to join the company and focus all of his efforts on one account. The Seventh Circuit rejected this claim on the grounds that the allegedly fraudulent statements, that "the company has lucrative compensation plan; the executives are 'straight shooters'; US Sprint is ethical and

committed to conducting business in accordance with the law", were "too general and difficult to substantiate to be considered statements of fact." LaScola, 946 F.2d at 568.

The allegedly fraudulent statements in LaScola are strikingly similar to those in the case at bar. Here, Schultz relies on: Wexler's statement in the October 20, 1989 offer letter that "I believe that GE Capital can offer you the opportunity to continue your successful sales track record and expand your career" (Schultz Ex. 10); Wexler's oral statements on October 25, 1989 that VEF would provide Schultz with support staff, that Schultz would "not be arbitrarily let go", and that Schultz should not be concerned about job security; and the statement in the May 18, 1990 announcement that the sales force reorganization would result in "growth opportunities."

As in LaScola, the statements regarding Schultz' future at VEF as well as the future direction of VEF's business are "too general and difficult to substantiate to be considered statements of fact." LaScola, 944 F.2d at 568. Moreover, Wexler's statement regarding support staff is immaterial.[5] Hence, Schultz has not put forth any evidence of a false statement of material fact.

In addition, Schultz has no evidence of fraudulent intent. Schultz contends that fraudulent intent may be inferred from Wexler's "career opportunity" comment, since Wexler admitted at his deposition that he was only offering Schultz an opportunity to become employed by VEF. This is not a reasonable inference. In fact, by offering Schultz employment, VEF did offer him an

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[5] Even if this statement were material, Schultz has no evidence that Wexler did not believe it.

opportunity to expand his career. Moreover, the decision maker in Schultz' May, 1990 termination (i.e., Labrozzi) was not involved in the October, 1989 hiring of TCF employees. Indeed, in late September, 1989, General Manager Neal forecast in VEF's Third Quarter Operating Review that after the hiring of ex-TCF sales employees in late-1989, the size of VEF's sales force would remain constant throughout 1990. Hence, the evidence regarding intent is so one-sided that no reasonable jury could find in favor of Schultz on this point.

Accordingly, Schultz is unable to support at least two elements of his fraud claim. VEF's motion for summary judgment on Count IX therefore is granted.

III. Alley's Fraud and Misrepresentation Claim (Count X)

Alley's fraud claim is even weaker than that of Schultz, and is based solely on his offer

letter, the May 18, 1990 organizational announcement, and one oral representation by Wexler regarding Alley's salary.

To prevail on his fraud claim under South Carolina law, Alley must establish: 1) a representation; 2) its falsity; 3) its materiality; 4) knowledge of its falsity or a reckless disregard of its truth or falsity; 5) intent that the representation be acted upon; 6) the listener's ignorance of its falsity; 7) reliance on its truth; 8) the listener's right to rely; and 9) consequent and proximate injury. First State Savings and Loan v. Phelps, 299 S.C. 441, 385 S.E. 2d 821, 824 (1989). These elements must be proven by "clear, cogent and convincing evidence." Id.

Alley is unable to satisfy several of these elements. First, there is nothing false in the offer letter, Wexler's comfort statement regarding Alley's salary, or the May 18, 1990

organizational announcement. Second, Alley has no evidence o fraudulent intent. The decision makers who were responsible for the reorganization and force reduction in either the TCF acquisition or the decision to hire Alley. Indeed, as noted above in connection with Schultz, at the same time VEF was making offers to TCF sales employees such as Alley, VEF projected in its Third Quarter Operating REview that there would be o decrease in sales employees through December 1990. Likewise, as also noted above in connection with Schultz, it is not reasonable to infer fraudulent intent from Wexler's "career opportunity" comment merely because Wexler admitted that he was only offering Schultz the opportunity to join VEF. Third, there is no evidence that Alley suffered any injury because of the purported misrepresentations. The only action that Alley took based upon these purported representations was to accept

VEF's offer of employment. He had no offers of employment from any other company between February, 1989 and June, 1990, and did not search for employment with any other company during that time. Moreover, Alley admits that if VEF had not offered him a position, his position at TCF would have ended when the TCF Agreement closed.

Alley therefore has not put forth sufficient evidence to support his fraud claim. Accordingly, VEF's motion for summary judgment on Count X is granted.

IV. Schultz' ERISA Claim (Count XI)

Schultz' contention that he should not have been required to pay health insurance contributions is meritless. Under the express terms of the June 25, 1990 letter explaining Schultz' separation package, only employees with three or more years of service with VEF were entitled to any medical

insurance contributions from VEF.[6] As stated in the letter in which Schultz was offered employment by VEF, as well as in the TCF Agreement itself, former TCF employees did not receive credit for TCF service for purposes of VEF layoff benefits:

> You shall receive credit for your full-time service with [TCF] ... in order to determine your eligibility for vacation pay, and eligibility for any retirement plan offered by [VEF]. For other [VEF] benefits, your eligibility shall be determined by your full-time service with [VEF] effective as of the closing.

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[6] The June 25th letter provides, in part:

> GE Life, Disability, Accidental Death & Dismemberment Insurance and Medical Plan [emphasis in original will be continued for a period of one year from your date of layoff ... If you are participating in medical benefits, you may continue medical coverage ... by paying any required contributions monthly in advance. However, if you have three [3] or more years of service, no contributions will be required. [emphasis added]

(Schultz Dep. Ex. 12).

(Schultz Dep., Ex. 10) (emphasis added); (TCF Agreement, § 5.6(C). Hence, because Schultz did not have three or more years of service with VEF, he was not eligible to receive layoff medical benefits without paying contributions.

Although VEF concedes that two other former TCF employees erroneously received credit for TCF services for purposes of VEF layoff benefits, this error does not entitle Schultz to similar treatment. Severance benefit plans, such as the VEF "layoff plan", are welfare benefit plans for purposes of ERISA. Young v. Standard Oil (Indiana), 849 F.2d 1039, 1045 (7th Cir. 1988). "Although ERISA imposes stringent accrual, vesting, and funding requirements on retirement benefit plans, such requirements are not imposed on welfare benefits plans." Id. Indeed, an employer may unilaterally change or abolish welfare benefit plans without violating

ERISA. Kreutzer v. A.O. Smith Corp., 951 F.2d 739, 743 (7th Cir. 1991). Schultz does not cite, and this court is not aware of, any case or statutory provision entitling Schultz to a specific welfare benefit under ERISA merely because a similarly situated employee was erroneously provided such a benefit.

Accordingly, the motion for summary judgment on Count XI is hereby granted.

V. Schultz' ADEA Retaliation Claim (Count XII)

On March 1, 1991, Schultz sent Labrozzi a letter containing a copy of a newspaper advertisement placed by VEF for a Regional Sales Manager. Schultz' letter stated: "One would believe employees placed on a layoff would be given first preference for this position prior to any public advertisement" (Conley Dep. exh. 15). Although Schultz never explicitly applied for this position, he now asserts that VEF refused to hire him

for this position because of his age discrimination charge. This retaliation charge is meritless.

The ADEA makes it illegal for an employer to discriminate against an employee because he or she "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Chapter." 29 U.S.C. §623(d). To establish an unlawful retaliation charge, a plaintiff "must show that (1) [he] engaged n statutorily protected expression; (2) [he] suffered an adverse action by [his] employer; and (3) there is a causal link between the protected expression and the adverse action." Holland v. Jefferson National Life Ins. Co., 883 F.2d 1307, 1313 (7th Cir. 1989).

In the case at hand, Schultz has not produced any evidence of a causal nexus between the filing of the agency action and VEF's failure to re-hire him. See McCarthy

v. Kemper Life Ins. Cos. 735 F.Supp. 251, 253 (N.D.Ill. 1989), aff'd, 924 F.2d 683 (7th Cir. 1991) (unsubstantiated allegations of retaliation are insufficient to establish causal link). To the contrary, when Labrozzi terminated Schultz, he refused to give Schultz a reference because Schultz' performance was so poor. Accordingly, the motion for summary judgment on the retaliation claim, Count XII, is hereby granted.

CONCLUSION

For the reasons discussed above, the defendant's motion for summary judgment is hereby granted.

ENTER

BRIAN BARNETT DUFF,
JUDGE
UNITED STATES DISTRICT
COURT

August 19, 1993

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 10, 1994

BEFORE

Hon. ALBERT J. ENGEL, Circuit Judge*

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

HUBERT C. SCHULTZ and and DOYLE C. ALLEY,	Appeal from the United States District Court for the Northern District of Illinois,
Plaintiffs-Appellants,	
v.	Eastern Division.
GENERAL ELECTRIC CAPITAL CORPORATION	Nos. 93-3273 & 93-3321
Defendant-Appellee	No. 91 C 788
	Brian Barnett Duff, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by

Plaintiffs-Appellants, no judge in active service has requested a vote thereon,[1] and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* The Honorable Albert J. Engel, Judge of United States Court of Appeals for the Sixth Circuit, is sitting by designation.

1 The Hon. Walter J. Cummings and Hon. John L. Coffey took no part in the consideration of this petition.